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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-1371

DELAWARE,

Petitioner,

v.

WILLIAM J. PROUSE, III,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT

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WILLIAM J. PROUSE, III,

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware appears as *State* v. *Prouse*, Del.Supr., 382 A.2d 1359 (1978) (A20). The opinion of the Superior Court of the State of Delaware (A16) is not reported.

JURISDICTION

The opinion of the Supreme Court of the State of Delaware was filed on February 1, 1978, and the mandate of that court was issued February 13, 1978. The

petition for certiorari was timely filed on May 2, 1978, and was granted on October 2, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

However, the opinion of the Supreme Court of the State of Delaware is ambiguous as to whether the judgment rests upon the Fourth and Fourteenth Amendments to the United States Constitution or upon the Delaware Constitution,[1] or both. Consequently, jurisdiction may not lie in this Court because of the possible existence of an independent and adequate state ground for the judgment below.[2]

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional provisions noted by the State, the following provision of the Delaware Constitution is also involved:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation. Delaware Constitution of 1897, Article I, § 6.

[1] Del.Const., art I, § 6 Del. Code Ann. (1897).
[2] See Point III, *infra*.

QUESTION PRESENTED

Does a discretionary and arbitrary stop of a motor vehicle by a roving police patrol without articulable suspicion violate the and Fourth Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Defendant adopts the State's statement of the case with the following additions.

Patrolman Anthony Avena testified that he stopped Defendant only because Defendant's car was in the area and the patrolman was not answering any other complaints. He described the stop as "more or less a routine check, basically just to check the driver's license and registration." (A7-8). He had observed no traffic violations or other criminal activities, and he conceded that there was nothing suspicious about Defendant's car. (A10). Patrolman Avena characterized the stop as "random," saying, "I saw the car in the area and was not answering any complaints so I decided to pull them off." (A9). He said that he did not "make such stops a habit," (A9), although he had conducted such document check stops before.

Patrolman Avena also testified that neither the New Castle County Police Department, nor the Office of the Attorney General of the State of Delaware had established any procedures, standards, or guidelines authorizing or governing the stop of a motor vehicle

to check license and registration documentation. (A12).

The trial court granted Defendant's motion to suppress evidence seized as a result of the stop. The Delaware Supreme Court reserved the question of the constitutionality of non-arbitrary, systematic roadblock stops,[1] but affirmed suppression of evidence seized during the arbitrary, suspicionless stop of Defendant by a roving police patrol:

> Because we are of the opinion that non-systematic stops by police, who have no reasonable suspicion that a legal violation has occurred, violate Federal and State constitutional guarantees, we affirm the Superior Court order and dismiss the appeal.
>
> *State* v. *Prouse*, Del. Supr., 382 A.2d 1359, 1361 (1978)(A21).

SUMMARY OF ARGUMENT

A police stop of a motor vehicle travelling public roads to question its occupants is a "seizure" within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution and, thus, must be justified by the state as not "unreasonable." *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); cf. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). The reasonableness of such a seizure depends

[1] *State* v. *Prouse*, 382 A.2d 1359, 1362 (1978) (A23).

upon the balance between the governmental interest alleged to justify it, and the individual's right to personal autonomy and security free from arbitrary interference by police officers, *Brignoni-Ponce*, *supra*, as further augmented by the citizen's interest in freedom of travel, *United States* v. *Guest*, 383 U.S. 745 (1966). Where a stop by a roving police patrol is based solely on the whim of the patrolman, and there are no articulable facts to lead the officer to believe that a law has been violated or that the vehicle poses a threat to public safety, the stop is constitutionally indefensible. *United States* v. *Brignoni-Ponce*, *supra*; cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968).

This case does not pose the question whether or not truly random spot-checks could pass constitutional muster. The spot-check in this case arose from the subjective decision of "an officer to single out one among many automobiles for investigation, with no cause to believe that a violation of a law was taking place and nothing to show that the decision was guided by any standard which prevented it from being purely arbitrary." *State* v. *Bonds*, 577 P.2d 781, 784 (Haw. Supr. Ct. 1978).

The damage to personal liberty caused by such intrusive and arbitrary police behavior is substantial. This Court has long recognized the dangers inherent in the allocation of unfettered discretion to law enforcement officers, and has therefore required specificity of regulation wherever law enforcement interests intrude upon rights of personal liberty. See, *e.g.*,

Marshall v. *Barlow's, Inc.*, ___ U.S. ___, 56 L.Ed.2d 305 (1978).

Defendant does not deny the need for the exercise of professional discretion by police officers in the widely varying circumstances that arise on the beat or on the highway. But, as Chief Justice Burger has noted, there must be "carefully devised basic standards to guide the exercise of this discretion. . . ."[4] Where policemen are allowed unfettered authority to stop persons for questioning, they are likely to focus the greater part of their attention upon those whom they identify with population groups or personality traits which they disfavor.[5] As this Court has held, such abuse can only be avoided either by a system which requires police to have articulable reasons for stopping one particular vehicle rather than another, or by a truly random system of selection which limits the influence of caprice, prejudice, and bias.

The state's interest here does not require variance from that standard. While the public interest in keeping unsafe drivers and unsafe vehicles off the road is substantial, that interest is not significantly served by arbitrary stops of law-abiding motorists based on nothing more than a police officer's whim or caprice. The interest asserted by the state can be equally or

[4] Quoted in "Standards Relating to the Urban Police Function," American Bar Association Project on Standards for Criminal Justice, p. 2 (1972).

[5] This common sense assessment is extensively supported by scientific literature, which is set forth in Appendix A, infra.

better served by means less destructive of personal rights.

Finally, there is a strong possibility that the judgment below rests upon an adequate and independent state ground, which counsels dismissal of the writ of certiorari as improvidently granted, *Jankovich* v. *Toll Road Comm'n*, 379 U.S. 487 (1955), or remand to the Delaware Supreme Court for clarification of the ground for its decision.

ARGUMENT

I. A DISCRETIONARY, CAPRICIOUS AND ARBITRARY STOP OF A MOTOR VEHICLE BY A ROVING POLICE PATROL WITHOUT ARTICULABLE SUSPICION VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Whether the discretionary stop of Defendant by a roving police patrol, without any articulable suspicion, and made pursuant to no rules, guidelines, procedures, or other specific neutral criteria, is reasonable within the meaning of the Fourth Amendment depends on a balance between the individual interests infringed and the public interest. On the facts of this case, that balance must be struck in favor of the Defendant. The stop at issue violated rights of privacy, autonomy, security, and free passage, and if sanctioned would permit every person travelling the public

roads in our nation to be stopped without any cause shown. On the other hand, the state has not demonstrated that the stops it defends are necessary, or effective, or that less intrusive measures are not available to meet its interests.

A. Arbitrary Police Stops to Check Documents Inevitably Entail Significant Intrusions Upon Protected Constitutional Rights.

This case involves the arbitrary stop[6] of a motor vehicle by a roving police patrol without any articulable suspicion[7] that a law was violated, or that the vehicle was being operated in an unsafe manner. The sole purpose of the stop was to conduct a driver's license and motor vehicle registration documents check. Such a stop is clearly a "seizure" within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution and consequently the Fourth Amendment requires that such seizure be reasonable. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). All forms of "seizure," including a brief detention for the purpose of question-

[6] *State* v. *Prouse*, Del. Supr., 382 A.2d 1359, 1364 (1978) (A28).

[7] The Delaware Supreme Court would not require a showing of "probable cause" in order to find such stops constitutionally permissible, *State* v. *Prouse*, *supra* (A28), and Defendant does not quarrel with that holding for purposes of this case.

ing, are subject to constitutional scrutiny whether the individual is accosted on foot, *Terry* v. *Ohio*, *supra* at 16, seated in a parked automobile, *Adams* v. *Williams*, 407 U.S. 143, 146, (1972), or driving a motor vehicle down a highway, *United States* v. *Martinez-Fuerte*, 428 U.S. at 556; *United States* v. *Brignoni-Ponce*, 422 U.S. at 878.

Roving stops of individuals driving in conformance with the law necessarily entail substantial intrusions upon significant Fourth Amendment interests: the "right to free passage without interruption," *United States* v. *Martinez-Fuerte*, 428 U.S. at 557-58; the "right to personal security," *United States* v. *Brignoni-Ponce*, 422 U.S. at 878; and the right to privacy, *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968).[8] At a minimum, a document check involves interference with travel and the personal activities for which it is undertaken—commencing work on time, visiting a hospitalized friend, appearing in court or going to church. This interference is typically effected by the red, flashing light and wailing siren of a previously unnoticed moving car, which this Court has already recognized as one of the the most unsettling and frightening forms of governmental intrusion. *United States* v. *Ortiz*, 422 U.S. 894, 895-95 (1975).[9] The individual inevitably feels the anxiety of wondering "What have I done?",

[8] In the classic formulation of the right to privacy, Warren and Brandeis defined it quite simply as "the right to be let alone." 4 Harv. L. Rev. 193 (1890).

[9] "[The] Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily

the fear of "What will he do to me?", and the annoyance or outrage at being stopped and singled out in public "When I haven't done anything."[10]

Next, the officer will approach and conduct a visual inspection of the interior of the car and its occupants. This visual scrutiny is followed by oral interrogation, and even at this point there is no assurance that the officer will assuage the citizen's fears by explaining the limited purpose of the stop[11].

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frightening or offensive methods of surveillance and investigation." *United States* v. *Ortiz*, 422 U.S. 891, 895 (1975). In authorizing systematic roadblock—as opposed to roving patrol—stops for inquiries by the Border Patrol regarding one's status in the country, this Court has held that "the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." *United States* v. *Martinez-Fuerte*, *supra* at 558.

[10] The Court has recognized the psychological impact of "stigmatizing" those selected from the flow of traffic. *Martinez-Fuerte*, *supra* at 560. Yet it discounted the effect there because of "the public and relatively routine nature" of the roadblock procedure which led to the stigma. Here the stops will inevitably be, in the Court's words, "frightening or offensive," *ibid.*, thus intensifying the subjective sense of stigmatization. Objectively, too, singling one out from the flow of unimpeded traffic suggests more wrongdoing to others than a secondary referral at a public roadblock where everyone expects to be stopped—and some may be pulled aside simply because they do not have the documents immediately available.

[11] Recognizing the inherently frightening nature of a roving stop and the need to reassure citizens even before the officer's first contact, the District of Columbia police instituted the unique requirement that the stopping officers hand the retained motorists a signed, printed departmental form entitled, "What This Spot Check Means to You." *United States* v. *Montgomery*, 561 F.2d 875, 883, n. 8 (D.C. Cir. 1977)

Even if such discretionary stops were thus limited, existing case law would still condemn them absent a showing of reasonable suspicion. *United States* v. *Martinez-Fuerte*, 428 U.S. at 558-59; United States v. *Brignoni-Ponce*, 422 U.S. at 882-883. Cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Moreover, experience confirms that traffic stops are hardly ever limited to a mere examination of documents. *Note*, "Automobile License Checks and the Fourth Amendment," 60 Va. L.Rev. 666, 672 (1974). Although the State claims that the "entire procedure should take no more than a minute or two" if the documents are in order (Pet. Brief at 12), it has adduced no evidence as to the actual time such stops involve. In fact, documentary checks must inevitably take substantially longer.

First, a document check will typically be conducted by two officers. One will approach the passenger side and keep the occupants and the interior of the car under constant surveillance while the other approaches the driver to inquire regarding license and registration. *Note*, *supra*, 60 Va.L.Rev at 672; *Palmore* v. *United States*, 290 A.2d 573, 58 (D.C. Ct. App. 1972); *United States* v. *Montgomery*, 561 F.2d 875, 880 n.4 (D.C. Cir. 1975). See also *Commonwealth* v. *Swanger*, 453 Pa. at 109, 307 A.2d at 876. Rather than a minimal intrusion of the privacy of the driver, there is an intensive and deliberate visual inspection of the interior of the vehicle and all its occupants.

Second, some police departments find it preferable, for safety reasons, to order occupants out of the car

even during a document check. See *United States* v. *Harflinger*, 436 F.2d 928, 933 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Busby* v. *United States*, 296 F.2d 328, 330 (9th Cir. 1971), *cert. denied*, 369 U.S. 876 (1962); *State* v. *Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *Note*, *supra*, 60 Va.L.Rev. at 672 n. 31. Such an order not only prolongs the interference with travel, but significantly increases all forms of intrusion:

> A woman stopped at night may fear for her safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority.
>
> *Pennsylvania* v. *Mimms*, 54 L.Ed.2d 331, 343 (1977) (Stevens, J., dissenting).

This court held in *Mimms* that this "incremental intrusion resulting from the request to get out of the car" does not itself violate the Fourth Amendment "*once the vehicle was lawfully stopped*" for a motor violation. *Id.* at 336.[12] (emphasis added). Nevertheless, this substantial additonal intrusion is yet another factor in evaluating the impact upon personal interests of approving arbitrary motor vehicle stops by roving police patrols.[13]

[12] The stop in *Mimms* was prompted by a routine patrol's observation of an expired license plate indicated an unregistered motor vehicle. *Id.* at 334. It is precisely this type of observation of specific articulable fact which Defendant contends is the minimum constitutional predicate for a document check stop.

Third, some departments provide for a routine computer check for criminal warrants, license suspensions, or car thefts, entailing a still greater delay. *People* v. *McGaughran*, 47 U.S.L.W. 2336 (Calif. Sup. Ct., October 19, 1978); *United States* v. *Montgomery* *supra*, 56 F.2d at 880, 883 nn. 8 and 9.[14] In *McGaughran*, for example, the initial warrant check took 10 minutes and the final confirmation of the warrants required an additional 20-25 minutes, 47 U.S.L.W. at 2336, thus lengthening the detention time and further stigmatizing and unsettling the accosted individual.

[13] As Justice Stevens noted in *Mimms*, some police authorities argue that the safer course is not to allow the driver out of the car, a restraint on liberty hardly less significant:

> If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and tell the driver to "please stay in the car!" Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

Pennsylvania v. *Mimms*, *supra*, 54 L.Ed.2d at 342 n. 10 (Stevens, J., dissenting), quoting from A. Yount, *Vehicle Stops Manual* 2-3 (1976). Locking the individual in the car increases the objective limitation on movement and heightens dramatically fear and shock.

[14] The official form handed to stopped motorists in the District of Columbia acknowledges that one of the purposes of the spot check is "to combat the extensive stolen auto problem." *United States* v. *Montgomery*, 561 F.2d at 883 n. 9.

For these reasons, the California Supreme Court has invalidated the routine use of warrant checks even for those individuals directly observed by police to violate traffic safety laws. *People* v. *McGaughran*, *supra* at 2337.[15]

In light of these facts, the State's undemonstrated contention that document checks would only last "a minute or two" is dubious, and an extremely weak basis on which to justify abridging the Fourth Amendment interests of every driver in America. Although the State suggests that the "reasonable suspicion" standard would govern a document stop followed by a radio check for outstanding traffic warrants (Pet. Brief at 11 n. 4), it ignores the fact that the *only* way to verify the continuing validity of facially adequate licenses and registrations is to conduct a radio check to ensure that they have not been suspended or revoked. Thus, a driver whose documents are fully in order will necessarily be subjected to an intrusion lasting more than a "minute or two," unless the State means to say that traffic safety will be promoted simply by having motorists carry certain pieces of paper *regardless* of whether they are legally valid.[16] In fact, if the State is serious about promoting

[15] The individual was stopped for driving in the wrong direction on a one-way street. *People* v. *McGaughran*, 4 U.S.L.W. at 2336.

[16] Delaware law provides for discretionary or mandatory revocation or suspension of drivers' licenses as a result of a history of traffic offenses. 21 *Del. C.* §§ 2732, 2733. Because notice of revocation or suspension may be accomplished by mail, 21 *Del.C.* § 2736, there is no guarantee that a driver whose license has been suspended will have physically surrendered that license to the issuing authority.

traffic safety through license and registration checks, the only driver who will be subjected to a radio check is the one who has no license, or who presents one which is invalid on its face.

Finally, arbitrary car stops will inevitably intrude upon the privacy and liberty of wholly innocent automobile passengers, who bear no responsibility whatever for complying with license or registration laws. These innocent by-standers will not only be subjected to the frightening interference with autonomy and discomfiting visual scrutiny which inevitably attend any car stop, but they may also be interrogated, *Martinez-Fuerte*, ordered out of the car, *Mimms*, or even subjected to a warrant check, *McGaughran*. Car stops must only be permitted upon the basis of some articulable, individualized reasonable suspicion in order to minimize these significant and wholly unjustified intrusions upon the personal Fourth Amendment rights of automobile passengers.

Arbitrary stops by roving police patrols not only intrude rights of personal automony, security, and privacy protected by the Fourth and Fourteenth Amendments, but also seriously impinge upon "one's right to travel." *United States* v. *Martinez-Fuerte*, 428 U.S. at 560 n. 14 (1976), "which has long been recognized as a basic right under the Constitution."

United States v. *Guest*, 383 U.S. 745, 758 (1966). See also *Carroll* v. *United States*, 267 U.S. 132, 154 (1925); *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 48, 49 (1868). Judicial approval of the practice at issue will subject motorists to "potentially unlimited interference with their use of the highways." *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 882. See also *United States* v. *Montgomery*, 561 F.2d 875, (D.C. Cir. 1977).[17]

Freedom of travel "is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. . . . [I]t is a virtually unconditional personal right. . . ." *Shapiro* v. *Thompson*, 394 U.S. 618, 642-43 (1969) (Stewart, J., concurring). To uphold its restriction based on nothing more than the whim or caprice of a police officer is to reduce that right to a "mere conditional liberty."

[17] While the cases before this Court have all involved the right of *inter*state travel, *compare Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 255 (1974), the lower federal courts "have been virtually unanimous in holding or assuming that intrastate travel has the same protection as interstate travel." Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, 4th ed., Vol. 1, Law School Edition p. 698-99 (Little, Brown & Co. 1976). Indeed, in the first articulation of the right to travel in this Court, Chief Justice Taney commented that Americans must be allowed to travel between the states "as freely as in our own states," implying that the former right is derivative of the latter. *The Passenger Cases*, *supra*, 7 How. at 492.

B. The Constitution Precludes the Delegation of Unbridled Discretion to Police Officers in Areas Which Intrude Upon Fundamental Liberties.

1. Courts and commentators have consistently recognized the need for articulated standards and guidelines to guide the exercise of discretion by law enforcement officers in order to prevent abuse.

The intrusion into personal autonomy described in the preceding section would exist even if the targets of stops by roving patrols were selected in a truly random way[18] beyond the control of the individual police officer. However, where the targets of the stop are selected arbitrarily, the potential for abuse is greatly enhanced.

In its decision, the Supreme Court of Delaware recognized the legitimate state interest in enforcing li-

[18] Petitioners refer to the type of stop involved in this case as "random." It is, of course, not random at all. Randomness involves a procedure that gives "each subject the same chance as that of any other subject of being assigned to any given condition. The procedures are such that any selection based, either consciously or unconsciously, on the investigator's judgment is ruled out." Selltiz, Jahoda, Deutsch, Cook, *Research Methods in Social Relations* 99 (1961). *Compare United States* v. *Montgomery*, 561 F.2d 875, 884 (D.C. Cir. 1977):

> The important point is that the stops be made in some *systematic* fashion, prescribed in advance by superiors.
>
> Stops are not random simply because they are left to the officer's discretion (emphasis in original).

censing and registration laws, (A27), but refused to condone this arbitrary stop by a roving police patrol:

> [T]he factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedures. The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possibility of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures could be practiced with little or no chance for judicial review.

State v. *Prouse*, 382 A.2d at 1364 (A27-28). See also *United States* v. *Montgomery*, 561 F.2d 875 (D.C Cir. 1977).

It also carefully limited its holding:

> The issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is *not* now before the Court. Systematic stopping procedures entail limited exercise of discretion concerning which vehicles to stop, and, therefore, pose legal issues different in nature from those presented by the random stop practice challenged here. *State* v. *Prouse*, 382 A.2d at 1362 (A23) (emphasis in the original).

Other jurisdictions which have found arbitrary document check stops by roving police patrols unreasonable have likewise reserved judgment on the question of the constitutionality of systematic roadblock stops. See, *e.g.*, *United States* v. *Montgomery*, *supra* at 838; *State* v. *Bonds*, 577 P.2d 781, 784 (Haw. 1978); *People* v. *Ingle*, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E. 2d 33 (1975); *Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875, 877 n. 3 (1973). Compare *United States* v. *Brignoni-Ponce*, *supra*, with *United States* v. *Martinez-Fuerte*, *supra*.

Discretion is an essential aspect of good law enforcement. It gives police officers the ability to exercise flexibility in the enforcement of law and deterence of crime. When used properly, discretion is a positive force which not only adds to the effectiveness of the police officer but also can operate to improve community-police relations.

However, this Court has long recognized the dangers inherent in the allocation of unfettered and unregulated discretion to public officials in the area of law enforcement. As a unanimous court held in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972), overturning a vagrancy ordinance as unconstitutional:

> Where. . .there are no standards governing the exercise of the discretion. . .the scheme permits and encourages an arbitrary and discriminatory enforcement by local prosecuting officials,

against particular groups deemed to merit their displeasure.

Thornhill v. *Alabama*, 310 U.S. 88, 97-98 (1940).

See also, *e.g.*, *Smith* v. *Goguen*, 415 U.S. 566, 574-75 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972); *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971).[19]

It was precisely the evil of arbitrary discretion, as exercised by British agents using general warrants,

[19] This principle is part of this Court's void-for-vagueness doctrine, which is used, *inter alia*, to limit police discretion. See Amsterdam, "The Void for Vagueness Doctrine." 109 U.Pa.L.Rev. 67 (1960). The doctrine requires legislators to

> set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement."

Smith v. *Goguen*, 415 U.S. 566, 574 (1974). The courts have frequently overturned vagrancy or loitering statutes as void for vagueness, because such laws define the crime so generally that the actual definition becomes purely the subjective opinion of an individual law enforcement officer. *Papachristou*, *supra*, 405 U.S. at 170; *Smith* v. *Florida*, 405 U.S. 172 (1972); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Hall* v. *United States*, 459 F 2d 831, 837 (D.C. Cir. 1972) (en banc); *Ricks* v. *District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968). Vague laws are easily used by police officers to harass particular individuals or classes of people of whose behavior they disapprove, *Papchristou*, *supra*, 405 U.S. at 170; *Gomez* v. *Wilson*, 477 F.2d 411, 427 (D.C. Cir. 1973) (Bazelon, C.J., concurring in part, dissenting in part), to get those people off the streets whom the police believe have committed another crime for which there is insufficient evidence to obtain a conviction, *Hall* v. *United States*, 459 F.2d 831, 836 (D.C. Cir. 1972) (en banc), and in general to "enforce [the law] according to their [the police's] personal prejudices." *Collins* v. *Smith*, 447 F.Supp. 676, 691 (N.D. Ill. E.D. 1978).

which gave rise to the Fourth Amendment.[20] Its restriction against unreasonable searches and seizures has consistently been enforced to prevent the abuse of discretion by all law enforcement officials, and warrantless administrative searches have been specifically forbidden because of the great danger of abuse. *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Camara* v. *Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967). Last Term, this Court again restricted warrantless inspections by agents enforcing standards of the Occupational Safety and Health Act (OSHA) because a warrantless search "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field." A warrant ensures that a "neutral officer" has decided that the "inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978).

Arbitrary decision-making by police officers is at least as dangerous as arbitrary decision-making by administrative agents. Protection of citizens "against intrusion by the police" is "at the core of the Fourth Amendment." *Wolf* v. *Colorado*, 338 U.S. 25, 27

[20] See Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349, 366 (1974).

(1949). Chief Justice Burger has articulated the critical need for regulation of police discretion:

> It is often overlooked that no public officials in the entire range of modern government are given such wide discretion on matters dealing with the daily lives of citizens as are police officers. . .The policeman on the beat, or in the patrol car, makes more decisions and exercises broader discretion affecting the daily lives of people, every day and to a greater extent, in many respects, than a judge will ordinarly exercise in a week. . .
>
> No law book, no lawyer, no judge can really tell the policeman on the beat how to exercise this discretion perfectly in everyone of the thousands of different situations that can arise in the hour-to-hour work of the policeman. Yet we must recognize that we need not choose between no guidelines at all and perfect guidelines. There must be some guidance by way of basic concepts that will assist the officer in these circumstances.
>
> Basically, as I suggested, it is a matter of common sense, and sound judgment, and yet we know that one man's common sense may be another man's mistake. Hence this need for carefully devised basic standards to guide the exercise of this discretion and, second, for careful and comprehensive training of officers before they are thrust into situations that often baffle the wisest judge.[21]

[21] Address to a class of local and state police administrators on their graduation from the FBI Academy, quoted in *Standards Relating to the Urban Police Function*, ABA Project on Standards for Criminal Justice, 2 (1972).

See generally, Davis, *Police Discretion* (1975); cf. *Foley* v. *Connelie*, 435 U.S. 291, 297-300 (1978).

The possibility of abuse of discretion resulting from the lack of neutral standards is particularıy real in unsupervised encounters between police and motorists on the highway:

> The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camara* when it insisted that the discretion of the official in the field be circumscribed. . . *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973).

In later border patrol cases involving stopping cars to question occupants about their citizenship, this Court again recognized "the grave danger" that unfettered discretion "would be abused by some officers in the field." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559 (1976); citing *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975).[22]

[22] As an illustration of the dangers of unregulated discretion by highway patrolmen, see the District Court's findings of fact in *Lewis* v. *Hyland*, 554 F.2d 93 (3d Cir. 1977), *cert. denied*, 434 U.S. 931 (1977), discussed in Appendix B to this brief. The District Court opinion is not reported, but is included in the record filed in this Court in connection with the Petition for Certiorari, *Lewis* v. *Hyland*, No. 77-301, 38a-120a. That opinion described 66 separate highway encounters between motorists and New Jersey State Police and, according to the Court of Appeals, "revealed what can only be described as callous indifference by the

Defendant does not, of course, contend that all police officers will abuse their discretion. As Professor Davis wrote in his classic work on "Police Discretion":

> The reason for limiting and guiding discretion is *not* that human beings cannot exercise unlimited and unguided discretion wisely, justly, and beneficently. They often can. They often do. The reason is that out of a thousand officers, no matter how well screened, a large portion may be expected to abuse their power to a considerable extent, and some—perhaps only a few—are likely to occasional abuse of power that is quite serious.
>
> Davis, Police Discretion 143-44 (1975).

Standardless law enforcement and vague laws pose the same dangers. As Professor Davis has written:

> [W]hat if a statute is clear, and the vagueness is in the enforcement policy? If the police enforce a statute against one out of a hundred known violators, and no one can know in advance which one will be selected or why, does not the system of enforcement encourage arbitrariness and discrimination, and is it not therefore unconstitutional?
>
> Davis, "An Approach to Legal Control of the Police," 52 Texas L. Rev. 703, 704, 714 (1974)

New Jersey State Police for the rights of citizens using New Jersey roads." 554 F.2d at 94. Social science research into the exercise of police discretion similarly demonstrates the dangers of unregulated police discretion. A summary of that research is set forth in Appendix A.

> **2. A rule which invalidates only those arbitrary car stops proven to be improperly motivated would not adequately address the dangers posed by unfettered police authority.**

Courts,[23] commentators,[24] and even the State of Delaware,[25] have acknowledged the danger that unguided police authority to stop cars will result in the harassment of disfavored racial or cultural minorities or be used as a pretext for investigation of unrelated criminal activity, such as possession of drugs, firearms, or stolen vehicles. These assumptions are strongly supported by social science research and literature.[26]

It has occasionally been suggested that, to curb those abuses, the courts need hold invalid only those stops which the criminal defendant can later prove

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[23] *United States* v. *Montgomery*, 561 F.2d 875, 884 (D.C. Cir. 1977); *Palmore* v. *United States*, 290 A.2d 573, 582-83 (D.C. Cir. 1972), aff'd on jurisdictional grounds only, 411 U.S. 389 (1973); *State* v. *Prouse*, *supra*; *State* v. *Bonds*, 59 Haw. ___, 577 P.2d 781, 785-86 (1978); *Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875 (1973).

[24] Bacigal, "Some Observations and Proposals on the Nature of the Fourth Amendment," 46 G.W.L. Rev. 529, 558-60, 573-9 (1978); Note, "Automobile License Checks and the Fourth Amendment," 60 Va.L.Rev. 666 (1974). See also Case Note, "Fourth Amendment Precludes Drivers' License Inspection Vehicle Stops Not Based on Reasonable Suspicion or Made Pursuant to Random Selection Scheme," 24 Wayne L.Rev. 1123 (1978).

[25] Pet.'s Brief at 15-16.

[26] See Appendix A *infra*.

are motivated by bias or are mere pretexts for criminal investigations. *Palmore* v. *United States*, *supra*, 290 A.2d at 582 (1972); Pet. Brief at 15-16. However, as the Delaware Supreme Court recognized in the decision below, "burdening a criminal defendant with the task of proving that a police officer acted with an illegal subjective intent would, as a practical matter, emasculate any limited rule concerning random stopping procedures and in turn emasculate Fourth Amendment rights," *supra* at 1364 (A28).

This is true for several reasons. First, subjective attitudinal biases will necessarily underlie any police officer's perceptions and selections.[27] A police officer conducting a stop is often unaware that his perceptions or choices are infected by racial, political, or cultural biases, and is unable to articulate the underlying motives for his actions.

Second, in an individual criminal prosecution, the defendant will not be able to produce objective evidence of a pattern or practice of discrimination by introducing a wide-spread sample of police behavior over time.[28] The fact that the individual defendant stopped is black or long-haired, or has a Black Panther bumper sticker on his car,[29] will not be sufficient evidence that his particular stop was prompted by that

[27] See Appendex A, *infra*.

[28] See Appendix B, *infra*.

[29] See Heusenstamm, "Bumper Stickers and the Cops," *Transaction Magazine*, February 1971 (discussed in Appendix A).

sign of "differentness." Recognizing the evidentiary impossibility of establishing individual police bias and hence the ineffectiveness of a legal standard requiring such proof, this Court has repeatedly struck down vague standards which lend themselves too easily to discriminatory application. See, *e.g.*, *Papachristou* v. *Jacksonville*, *supra*.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the first case addressing police authority to stop citizens short of formal arrest, this Court explicitly rejected a rule premised on the subjective motivation of the police officer:

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be "secure in their persons, houses, papers and effects" only in the discretion of the police. *Terry* v. *Ohio*, 392 U.S. at 22.[30]

The Court should not now place upon the individual whose constitutional rights have been violated the nearly impossible burden of proving police bad faith in his individual case when the likelihood of discrimination, resulting from the absence of articulated standards, is so great.

[30] See also *In re Toney C.*, 21 Cal. 3d 888, 893 (1978) ("an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith.")

II. THE STATE INTEREST IN ARBITRARY TRAFFIC STOPS BY ROVING POLICE PATROLS CONDUCTED AT AN OFFICER'S UNBRIDLED DISCRETION DOES NOT OUTWEIGH THE INDIVIDUAL'S RIGHT TO PERSONAL SECURITY FREE FROM ARBITRARY INTERFERENCE BY LAW OFFICERS.

The reasonableness of a search or seizure depends "on a balance between the public interest, and the individual's right to personal security free from arbitrary interference by law officers." *United States* v. *Brignoni-Ponce*, 422 U.S. at 878.

Except in carefully limited circumstances, warrantless seizures not based on *some* quantum of articulable, individualized suspicion are unreasonable under the Fourth Amendment. See, *e.g.*, *United States* v. *Brignoni-Ponce*, *supra*. Defendant does not and would not contest that Delaware has a legitimate interest in promoting traffic safety. However, Delaware has not demonstrated that arbitrary stops of automobiles by roving police patrols would lead to any gains in traffic safety. Defendant submits that any marginal increase in traffic safety which might be gained by permitting arbitrary car stops by roving officers is not sufficiently weighty to justify departure from the crucial safeguards of the Fourth Amendment. Moreover, arbitrary stops are *not* an effective way of serving the interest in traffic safety, which can be better served by means less offensive to Fourth Amendment values of security, free passage, personal liberty, privacy, and freedom from arbitrary exercise of unbridled of-

ficial discretion.[31] Accordingly, on the record of this case, the Court must conclude that the stop of Defendant without articulable suspicion was unreasonable, as it has consistently held unlawful all such stops. *United States* v. *Brignoni-Ponce*, *supra*; *Carroll* v. *United States*, 267 U.S. 132, 135-154 (1925).

A. The Interest in Traffic Safety is Not Sufficiently Weighty to Justify Arbitrary Traffic Stops Without Individualized Suspicion.

In recent years, the Court has rejected a multitude of claims that particular societal interests justify intrusion into the personal liberty, security, and privacy guaranteed by the Fourth Amendment. Thus, for example, the Court has rejected efforts to dispense with the safeguards of the Fourth Amendment based on "the vital public interest in the prompt investigation of the extremely serious crime of murder," *Mincey* v. *Arizona* , ____ U.S. ____, 57 L.Ed.2d 290 (1978); the public interest in fire investigation, *Michigan* v. *Tucker*, ____ U.S. ____, 56 L.Ed.2d 486 (1978); and the public interest in occupational safety, *Marshall* v. *Barlow's, Inc.*, ____ U.S. ____, 56 L.Ed. 2d 305 (1978).

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[31] Of course, whenever a question concerning the constitutionality of a warrantless search or seizure arises, the burden *never* rests on the subject of the search or seizure to prove that it was *unreasonable*. Rather, the burden rests on the government to justify it. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971).

In considering dispensing with Fourth Amendment safeguards for seizures of persons riding in automobiles, the Court has held that the overriding national interest in checking the flow of illegal aliens justifies seizures by roving police patrols on less than probable cause, *but only so long as officers are aware of specific articulable facts warranting suspicion* that the vehicle stopped contains illegal aliens. *United States* v. *Brignoni-Ponce*, *supra*. The Court emphasized both "the importance of the governmental interest at stake. . .and the absence of practical alternatives for policing the border." *Brignoni-Ponce*, 422 U.S. at 881. The Court has further held that brief seizures without any showing of suspicion at fixed checkpoints near the border are reasonable, *but only under procedures designed to minimize intrusions upon Fourth Amendment interests*. *United States* v. *Martinez-Fuerte*, *supra*. Justice Powell's opinion for the Court emphasized that "the need for this enforcement technique *is demonstrated by the records in the case* before us," *id.* at 562 (emphasis added). He also carefully distinguished the roving patrols at issue in *Brignoni* from the fixed checkpoint stops *Martinez-Fuerte* presented. *Id.* at 558-60. The Court placed heavy reliance on the fact that the regularized system of established checkpoints at issue in *Martinez-Fuerte* minimized the dangers of "abusive or harassing stops of individuals. . . [as compared to] roving patrol stops." *Id.* at 559. See also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973) (condemning searches conducted at the officer's "unfettered discretion").

To justify the substantial encroachment on Fourth Amendment interests presented by arbitrary stops conducted by roving police patrols, Delaware has advanced only a single interest—the traffic safety interest in enforcing license and registration laws.[32] These laws are premised on the assumption—not demonstrated anywhere on this record—that arbitrary document checks enhance the ability of the public to safely use the roads. More specifically, license and registration laws reflect the assumption that unlicensed drivers are necessarily unsafe drivers, and the unregistered cars are necessarily unsafe cars. Without disputing the importance of the interest advanced by

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[32] The State of Delaware properly limits its defense of the police practice at issue here to its potential for promoting highway safety. Its *Amicus*, however, argues, perhaps more candidly, that one purpose of the practice is to uncover evidence of crime, particularly stolen cars. (Brief of *Amicus Curiae* in Support of the Petitioner, at nn. 3 and 4). But such arbitrary police behavior in search of evidence of crime can be no more justified under the Fourth Amendment than arbitrary intrusions into the home on the chance that crimes will be occasionally detected, as they no doubt would be, as a result of such practice. See, *e.g.*, *United States* v. *Montgomery*, 561 F.2d 875, 885 (D.C. Cir. 1977); *State* v. *Ochoa*, 23 Ariz. App. 510, 534 P.2d 441, 444 (1975); *Commonwealth* v. *Swanger*, 435 Pa. 107, 114, 307 A.2d 875, 879 (1973). Indeed, even in *Palmore* v. *United States*, 290 A.2d 573 (D.C. Ct. App. 1972), where the court upheld arbitrary stops to check licenses and registrations, the court specifically added that the *Terry* standard of "articulable suspicion"

> does come into play even before the initial stop if there is evidence that the officer's original reason in stopping the vehicle was to investigate some criminal behevior unrelated to the possession of a valid license and a valid registration.
>
> [290 A.2d at 583, n. 24].

the State, it is at once apparent that it is fundamentally different from the interests advanced in *Brignoni-Ponce* and *Martinez-Fuerte*, *supra*. First, the interest in traffic safety is indistinguishable from traditional concerns of domestic criminal law enforcement which do *not* justify relaxation of Fourth Amendment requirements. Enforcement of immigration law, on the other hand, has traditionally offered broader scope to official searches and seizures because of the unique national interests involved. Compare *Mincey* v. *Arizona*, *supra*, and *United States* v. *Ramsey*, 431 U.S. 606 (1977). This Court has many times rejected the claim that increased efficiency in domestic law enforcement suffices to justify departure from the strict requirements of the Fourth Amendment.[33]

Second, in all of its decisions regarding border stops and searches, the Court has relied heavily on "the absence of practical alternatives for policing the border." Compare *Brignoni-Ponce*, 422 U.S. at 881, with *Martinez-Fuerte*, 428 U.S. at 556.[34] The state has

[33] "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. Cf. *Coolidge* v. *New Hampshire*, [403 U.S. 443,] 481. . . [T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *United States* v. *Chadwick*, 433 U.S. 1, 6-11 (1977). See also *Mincey* v. *Arizona*, *supra*.

[34] "[M]aintenance of a traffic checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border. . . [R]outine stops at permanent check-

made no similar showing here, nor could it. Delaware has failed to demonstrate that arbitrary stops by roving police patrols are the most effective way of serving its interest, or that they are effective at all.[35] It has produced no empirical evidence to show how often arbitrary stops by roving patrols result in the discovery of unlicensed drivers or unregistered cars, or, more importantly, in the prevention of accidents. The State's argument rests on nothing more than a hunch that arbitrary stops are helpful in promoting traffic safety.[36] It has produced *no* evidence to show that such stops are *necessary*.

points [is] a practice which the government identified as the *most important* of the traffic-checking operations." *Martinez-Fuerte*, 428 U.S. at 556.

[35] See *infra* at ____.

[36] That "hunch," insofar as it assigns authority to the individual patrolman to set enforcement standards, runs directly contrary to the recent findings of the National Advisory Commission on Criminal Justice Standards and Goals. National Advisory Commission on Criminal Justice Standards and Codes: Police, Standard 9.6 Traffic Operations, p. 225. The Commission specifically cautions against those undefined traffic enforcement procedures which allow individual police officers to create enforcement standards. The Commission has found that such enforcement procedures are both inefficient and, indeed, counterproductive to the goal of fostering voluntary compliance with traffic safety laws. *Id.* at 227. The Commission concludes with the recommendation that:

> every police agency should develop and implement written policies governing the investigation of traffic accidents, the enforcement of state and local traffic laws, and traffic direction. Police chief executives should ensure that these policies are regularly communicated to all supervisors aand line personnel. [*Id.* at 225].

Finally, the magnitude of the problem addressed in *Brignoni-Ponce* and *Martinez-Fuerte* is not matched by the speculative incremental increase in traffic safety that license and registration checks might occasion.[37] Based on these differences, Defendant submits that the speculative increase in traffic safety advanced here is not of sufficient interest to justify dispensing with the requirement that seizures of persons are constitutionally permissible only upon specific articulable facts that reasonably warrant suspicion that the vehicles are operated by persons violating state licensing, registration, or other motor vehicle laws. Compare *United States* v. *Brignoni-Ponce*, 422 U.S. at 884.

On the basis of its prior holdings, the Court can only uphold this seizure if it finds that arbitrary stops by roving police patrols are a necessary and effective means of advancing traffic safety, and that no less intrusive techniques would advance that interest equally well. On the record presented here, no such findings are possible.

[37] The Court noted in *Martinez-Fuerte* that more than one-quarter of all deportable aliens apprehended in 1975—55,000 of 175,511— were apprehended through traffic checking seizures mostly at fixed checkpoints. *Martinez-Fuerte*, 428 U.S. at 553. Petitioner here had made no similar showing that arbitrary stops by roving police patrols appreciably aid either enforcement of licensing and registration laws, or furtherance of the State's asserted interest in promoting traffic safety.

1. Documentary registration inspections are not an effective or necessary means of identifying unsafe vehicles.

Contrary to the State's submission, mere possession of apparently proper documents is not inherently related to highway safety. *State* v. *Ochoa*, 23 Ariz.App. 510, 534 P.2d 441, 443 (1975), *rev'd on other grounds*, 112 Ariz. 582, 544 P.2d 1097 (1976); *People* v. *Superior Court, County of Los Angeles*, 436 P.2d 1025 (Cal. 1976). Moreover, even granting the connection between registration and safety, a stop of a motor vehicle is unnecessary to establish that an automobile has been inspected and registered. Delaware has mandatory annual vehicle inspection, 21 Del. C. § 2143(a), which is a prerequisite for registration. Every properly registered Delaware vehicle has a color coded, easily visible sticker affixed to the rear license plate which, at a glance, informs every passing police officer whether the vehicle has been properly registered and properly certified by the state as safe, 21 Del. C. § 2121(d). The registration card which is also provided the operator at the time of registration would, of course, not be visible to a police officer without stopping the driver. But the registration card provides only limited additional information—the name and address and signature of the owner, together with a description of the vehicle, 21 Del. C. § 2107(d). Such information, while useful in investigating such crimes as auto theft, is *not* necessary for the simple task of determining if a vehicle is registered and consequently

inspected, 21 Del. C. § 2142-43, and therefore safe. A document check stop, limited as the State asserts it is, would *not* ascertain newly developed facts bearing on traffic safety.

Thus, although the State's parade of horribles includes the spectre of a darting child being struck down by a vehicle with failing brakes because the police were prohibited from making spot checks of vehicle equipment (Pet.'s Brief, p. 8), the limited seizure it is seeking to justify here does *not* include such equipment inspection. The purpose of the spot check, we are told, is *solely*, to inspect the documents, driver's license and registration, and "if these two documents are in order, the motorist is allowed to proceed." (Pet.'s Brief, p. 12; see also *id.* at 14-15). Delaware law does authorize police, for reasonable cause shown, to stop a motor vehicle and to require that the vehicle submit to an additional inspection, 21 Del. C. § 2144. But that statutory authority argues strongly *against* the State's claim that unauthorized stops are necessary to meet the interest in safety. To the contrary, the Delaware legislature has obviously focussed on that interest, and provided a means to advance it consistent with the liberties of Delaware drivers. The legislature's failure to authorize the intrusive stops defended here, and provision of an alternative means for serving the interest in traffic safety and documentation checks, militates against the claim that such stops are "necessary." Serious intrusions into constitutional interests ought to be made by higher author-

ity than individual patrolmen acting without statutory guidance. Cf. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976).

In short, arbitrary car stops by roving patrols to check registration documents would do little, if anything, to keep unregistered, and arguably unsafe, cars off the road.

2. Documentary license inspections are not an effective or necessary means of identifying unsafe drivers.

There is no evidence in the record that unlicensed drivers are a widespread phenomenon, of anything like the magnitude of the illegal alien problem in the Southwest that led to the Court's sanctioning fixed-point seizures in *Martinez-Fuerte*.[38] Nor is there any indication in this record that arbitrary stops of motorists by roving patrols are an effective way of uncovering unsafe drivers, an evidentiary lacuna in sharp contrast with the Court's findings in *Brignoni-Ponce* and *Martinez-Fuerte*, based on extensive statistical evidence, that traffic checking was effective in uncovering illegal aliens. Moreover, even where the Court found that there *was* some rational connection between an identifiable individual characteristic and a valid state interest, it held that that characteristic, standing alone, was insufficient to justify an arbitrary roving patrol stop. *Brignoni-Ponce*, 422 U.S. at 886.

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[38] See, *e.g.*, *United States* v. *Martinez-Fuerte*, 428 U.S. at 551-52.

The State here has not pointed at *any* articulable facts to justify stopping Defendant, or some drivers rather than others: it seeks a wholly unfettered discretion to stop automobiles. But there is not, and cannot sensibly be, evidence that persons whom a particular policeman arbitrarily chooses to stop are less likely to be properly licensed, or safe, than those persons whom the policeman capriciously chooses *not* to stop. To the contrary, the opposite is more likely true. No particular individual characteristic, outside of extreme youth or bad driving habits, is likely to identify the unlicensed driver. The way to identify bad driving is to look for it.[39]

[39] For example, a "Selective Traffic Enforcement Program" in Flint, Michigan, dramatically reduced the number of deaths caused by traffic accidents by increasing enforcement emphasis on hazardous moving violations such as speeding, running traffic signals and driving while under the influence of alcohol. Reported in National Advisory Commission Report on Criminal Justice Standards and Codes: Police 230 (1973).

This "common sense" assumption is further borne out by other studies which have explored methods of improving traffic safety. The United States National Highway Traffic Safety Administration created a Participant's Reference manual designed for use in highway safety workshops for Traffic Court Judges (Wash., 1973, 90 p.). The manual excerpts and discusses the safety recommendations made by the authors of numerous articles and books, placing emphasis on eliminating road hazards, developing better highway directive and warning signals, producing safer cars, increasing driver safety training, and vigorously enforcing speeding and drunken driving laws. The workshop manual does not mention arbitrary document checks of passing vehicles as a means of increasing highway safety. Indeed, a routine vehicle stop is consistently described as a stop for a known violation of traffic law.

3. This Court has already identified less intrusive alternatives to arbitrary stops by roving patrols which would adequately protect the relevant societal interest.

The Court condemned arbitrary stops by roving patrols in *Brignoni-Ponce*, even where the government made a strong showing of necessity, and where it further showed that the arbitrary nature of the stop was somewhat reduced by reliance on the location of the stop and the nexus between the Mexican appearance of the passengers and the ancestry of the bulk of illegal aliens. The State here stands on even weaker ground, for recognition of the power it seeks would sanction not only stops near the border, but stops (functionally identical in time, scope, and circumstance to those condemned in *Brignon-Ponce*) *anywhere in the country*. The dangers foreseen by the Court in *Brignoni-Ponce* would be dwarfed by the stop authority sought here.[39]

[39] "We are are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities

The existence of numerous, more effective, and less intrusive alternatives to arbitrary traffic stops by roving patrols also demonstrates that the stops here are constitutionally offensive. First, patrolmen can, and do, simply observe traffic flow, and, in the exercise of informed professional discretion, pick out vehicles based on "specific, articulable facts, together with rational inferences from those facts, that vehicles" are driving in an unsafe or illegal manner. Compare *Brignoni-Ponce*, 422 U.S. at 884. Stopping those drivers who appear dangerous will thus serve the dual purpose of (1) pulling unsafe or uncertified drivers off the road; and (2) improving the odds that license and registration laws will be enforced (assuming that unsafe drivers are, in fact, likely to be unlicensed).

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is lawful and relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vechicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term 'reasonable distance' in § 287(a) (3) to mean within 100 air miles from the border. 8 CFR § 287.1(a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic. . ." 422 U.S. at 882-3.

Second, if there really is some strong state interest in a truly random system of documentary inspection of motorists, it could be implemented by either fixed checkpoints or other systematic, non-discretionary inspection procedures (such as electronically identifying every 100th, or 1000th, vehicle to pass a particular point, such as a toll booth). Although the Defendant does not concede that even those procedures would pass scrutiny under the Fourth Amendment, the Court has held that the difference between roving patrols and fixed checkpoint stops is of constitutional significance. Distinguishing between the arbitrary stops condemned in *Brignoni-Ponce* and the fixed stops sanctioned for border control interests in *Martinez-Fuerte*, the Court observed:

> [R]andom roving-patrol stops could not be tolerated because they "would subject the residents. . .to potentially unlimited interference with their use of the highways. . . There was also a grave danger that such unreviewable discretion would be abused by some officers in the field.

Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring the law-

abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making over-all decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. . . 422 U.S. 559.

As Defendant has demonstrated,[40] the room for unbridled exercise of discretion, and the potential for harassment and abuse presented by the roving-patrol stops defended here by the State, is at least as great. The Court has identified this discretion as a central evil at which the Fourth Amendment is directed. Even where searches and seizures are justified on less than probable cause to believe a crime has been committed, the Court has required alternative standards that preserve the public interest without wholly forfeiting individual interests in security, privacy, and liberty. See, *e.g.*, *Marshall* v. *Barlow's, Inc.*, U.S. , 56 L.Ed.2d 305 (1978) (warrant issued pursuant to administrative plan containing specific neutral criteria avoids dangers of unbridled discretion); *Terry* v. *Ohio*, 392 U.S. 1 (1968) (stop and frisk permitted on basis

[40] *Supra* at p. 19 n. 22. *See also* Appendix B, *infra*.

of specific and articulable facts warranting fear for safety); *United States* v. *Brignoni-Ponce*, 422 U.S. at 884 (stop by roving patrol on basis of specific articulable facts warranting suspicion that vehicle contains illegal aliens).[41]

The dangers posed by unchecked roving patrols, with the power arbitrarily to stop and question occupants of automobiles anywhere, for no reason at all, without even the guidance of statutory or administrative regulation, far outweighs their marginal utility. Although the Court has noted in *dictum* that "the practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use," *Martinez-Fuerte*, 422 U.S. at 560 n. 14, Defendant respectfully submits that the roving, arbitrary stop, based on anything less than specific articulable facts warranting belief that the operator is driving unsafely or illegally is neither useful[42] nor long accepted.[43] In-

[41] See also *United States* v. *Doran*, 482 F.2d 929 (9th Cir. 1973), and *United States* v. *Lopez*, 328 F.Supp. 1077 (E.D.N.Y. 1971) (anti-hijacking searches conducted on the basis of articulable facts). *See generally*, Ingram, "Are Airport Searches Still Reasonable?" 44 Jl. of Air Law & Commerce, 131 (1978). Where less immediate threats to innocent lives are involved, the courts have repeatedly struck down similar procedures. See, *e.g.*, *United States* v. *Craemer*, 555 F.2d 594 (6th Cir. 1977) (invalidating searches based on Drug Enforcement Administration's "drug courier profile").

[42] See *supra* at pp. 29-33.

[43] "[N]o one acquires a vested or protected right in violation of the constitution by long use, even when that span of time covers our entire existence and indeed predates it." *Walz* v. *Tax Com-*

deed, the Court' decision in *Brignoni-Ponce* makes sense *only* as a holding, dispositive here, that stops for questioning by roving patrols, based on no articulable and specific facts, are unreasonable under the Fourth Amendment.

The license to interfere with free movement of law-abiding citizens throughout the nation requested here has been steadfastly rejected by the Court at least since 1925. Even under the pressure of the law enforcement problem created by Prohibition, the court unanimously condemned arbitrary stops of automobiles without cause:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search. . .
>
> *Carroll* v. *United States*, 267 U.S. 132, 153-54 (1925) (Taft, C.J.).

mission, 397 U.S. 664, 678 (1970). Indeed the Court has specifically rejected just such an argument in the context of Fourth Amendment car searches when it struck down the Border Patrol's long-standing practice of arbitrarily stopping and searching cars for illegal aliens—even though the practice had also been sanctioned by Congressional statute, administrative regulation, and court decisions for a period in excess of 24 years. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973).

4. The interest in promoting respect for legal authority counsels against arbitrary police power.

In *Terry* v. *Ohio*, this Court acknowledged that "the degree of community resentment aroused by particular [police] practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." 392 U.S. 1, 17 n. 14. The *Terry* opinion cited the findings of a presidential commission that "in many communities, field interrogations are a major source of friction between the police and minority groups" and that this friction increases "as more police departments adopt aggressive patrols in which officers are encouraged routinely to stop and question persons on the street who are unknown to them." *Id.* at 14, n. 11, citing President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 183 (1967).

Six years later, an LEAA -funded Task Force on Criminal Justice Standards and Goals noted the corrosive effect,[44] even the appearance of arbitrariness has upon "public trust in the police," which was listed as one of the ultimate goals toward which criminal justice standards should be directed. National Advi-

[44] See also *Long* v. *District of Columbia*, 969 F.2d 927, 939 (D.C. Cir. 1972) (Wright, J., concurring): "The security of our citizens from official lawlessness, with its corrosive effect on private citizens' self-discipline and respect for government, demands no less."

sory Commission on Criminal Justice Standards and Goals: Police 9 (1973). As the Commission stated: "The acceptance of police authority depends largely on the belief that its exercise is reasonable." *Id.* at 18.

These observations by the Court and commissioners were confirmed by a recent study carried out by the Center for Police Development at Southern Methodist University School of Law. After reporting that the observed police officers focused their field interrogation practices disproportionately on young black males, the director of the Center commented:

> The persons subjected to the intrusion often perceive that they are a group singled out for special treatment. Accordingly, they react to this treatment with a sense of frustration, feeling that the system of just and fair administration of government power is substantially suspect.[45]
>
> Bogomolny, "Street Patrol: The Decision to Stop a Citizen," 12 Crim.L.Bull. 544, 573 (1976).

It is, as this Court confirmed in *Terry*, one of the fundamental goals of our Constitution to protect and enhance the citizen's faith in the fairness of government. Whatever limited utility arbitrary stops may

[45] The public perception that police arbitrarily single out for attention certain population groups is by no means limited to members of racial minority groups. Columnist Russell Baker commented in his New York Times column of September 14, 1977, that "[m]iddle class whites caution their sons against driving the New Jersey Turnpike with long hair." See discussion of *Lewis* v. *Hyland*, at App. B., *infra*.

have in advancing traffic safety is vastly outweighed by their corrosive impact on public trust in government and hence public compliance with law in general.[46]

Nothing short of individualized and articulable suspicion, or a structured and publicized program of inspections designed to remove the potential for individual police arbitrariness, can ensure both the government's interest in traffic safety and public acceptance of government authority generally.

III. THERE IS A POSSIBILITY THAT THE JUDGMENT OF THE COURT BELOW RESTED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Although Defendant believes that the judgment below should be affirmed on its merits, candor compels him to admit substantial doubt whether jurisdiction presently lies in this Court. A careful reading of the Delaware Supreme Court's opinion strongly sug-

[46] It is, in part, because the appearance of arbitrariness itself undermines faith in the administration of justice that the state's proposed standard of only barring proven discriminatory stops is unacceptable. (Pet. Brief at 15). For, long as the public perceives that police authority to stop is unbounded by standards or articulable suspicions, the exercise of that authority will *appear* arbitrary, especially to those who are powerless or the victims of discrimination. A rule that only bars those stops which can later be proven to be improperly motivated cannot satisfy that concern.

gests that its judgment rested upon an independent, adequate state ground. The Court below held:

> Because we are of the opinion that non-systematic stops by police, who have no reasonable suspicion that a legal violation has occurred, violate Federal and State constitutional guarantees, we affirm the Superior Court order and dismiss this appeal. (A21)

The Court said further:

> The Delaware Constitution, Article I, § 6, is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former. *State* v. *Moore*, Del. Super. 187 A.2d 807 (1963).

The Delaware Court thus held that a violation of the Fourth Amendment is necessarily a violation of the state constitution. But it left unclear whether the arbitrary stop before it would have violated the Delaware Constitution, even if it did not violate the Fourth Amendment.

In short, it is unclear, and quite possible, that the evidence at issue was independently subject to suppression under Delaware law. See *Schaffer* v. *State*, 184 A.2d 689 (Del. Sup. Ct. 1962).

Where an adequate and independent state ground clearly exists for a decision, this Court does not review the federal question in order to preserve the proper division of authority between state and federal courts.

Murdock v. *City of Memphis*, 20 Wall. 590 (1875). Where a state court opinion leaves ambiguous whether its decision was grounded on state or federal law, this Court has either dismissed the writ of certiorari as improvidently granted, *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1955), or has sought clarification from the state court prior to ruling on the federal issue. See, *e.g.*, *Ohio* v. *Gallagher*, 425 U.S. 257 (1976); *California* v. *Krivda*, 409 U.S. 33 (1972); *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194 (1965). Such clarification is necessary to avoid the anomaly presented when a subsequent state court judgment renders this Court's opinion advisory. See *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), judgment reinstated under state constitution, ____ S.D. ____, 247 N.W. 2d 673 (S.D. 1976).

Because the basis for the opinion below is unclear, the Court should dismiss the writ of certiorari as improvidently granted. In the alternative, the Court should vacate and remand for clarification, or continue the case pending application by petitioner to the state court for clarification of the basis of its judgment. *Herb* v. *Pitcairn*, 324 U.S. 117, 128 (1945).

CONCLUSION

Even when, as in *United States* v. *Carroll*, *supra*, the enforcement of an express command of a constitutional amendment was the public interest asserted to justify intrusions into personal liberty similar to

these, this Court declined to provide unsupervised, unregulated law enforcement officials with the unlimited power to stop automobiles on the highway on the basis of their own unfettered discretion.

The state interest *asserted* here is the general one of promoting traffic safety. But the record in this case is devoid of any evidence suggesting that arbitrary vehicle stops by roving police patrols will further that end. In reality, the only state interest at issue in this case is the enforcement of certain licensing and registration laws.

When the only interest at stake is investigation of such petty offenses, when the technique at issue is bounded by no specific neutral criteria, when the effectiveness of that technique is wholly undemonstrated, and when far more effective techniques are available to further the interest asserted—then the power of uncontrolled search and seizure, "one of the first and most effective weapons in the arsenal of every arbitrary government," *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting), must be denied.

For the reasons stated in Arguments I and II, the judgment of the Delaware Supreme Court should be affirmed. In the alternative, for the reasons stated in Argument III, the writ of certiorari should be dismissed as improvidently granted, or the case remanded for clarification by the Delaware Supreme Court as

to whether its judgment rests on adequate and independent state grounds.

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APPENDIX

APPENDIX A

Police Discretion: The Social Science Perspective

The danger inherent in unregulated police authority is extensively documented by social science research. Although the State has characterized Patrolman Avena's stop as a "random" stop, human beings are simply incapable of producing random results unless they follow scientific randomization *methods*, such as using a random-number generator. Individuals, including police officers, are inevitably influenced by their past experiences, values, and attitudes where they are called upon to select other human beings or to gauge their motives or intent. "[T]he general inclination to place a person in categories according to some easily and quickly identifiable characteristic such as age, sex, ethnic membership, nationality, or occupation, and then to attribute to him the qualities believed to be typical of members of that group," results in judgments not about the observed act but about the actor based upon a previously adopted stereotype.[1] "[A]n individual's perception of a stimulus, object or event is influenced by his particular needs, wishes, and expectations of the moment—[that is,] we tend to perceive what we wish or expect to perceive."[2]

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[1] Tajfel, "Social and Cultural Factors in Perception," in *Handbook of Social Psychology*, 423 (Lindzey and Aronson eds., 1969).

[2] Duncan, "Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks," 34 *Journal of Personality and Social Psychology*, 590 (1976).

For example, one basic mode of human communication is facial expression. Such messages were once thought to be universally recognizable, but recent experimentation has determined that ". . . [W]e do not interpret 'messages' sent by black faces (whether young, old, male or female) the same as 'messages' sent by white faces. Similarly, we do not interpret 'messages' sent by male faces (whether black, white, young or old) the same as 'messages' sent by female faces."[3] Furthermore, human beings make very harsh or very generous judgments about the behavior of others based exclusively on their appearance. In one experiment, two groups of college students were given identical descriptions of a small boy roaming about a playground and committing acts of minor destruction. One group had a photograph of an attractive child appended to the story and the other group a photo of a distinctly unattractive child. The attractive child was more frequently seen as engaged in boyish mischief while the unattractive child was more frequently labeled as malicious and destructive.[4]

[3] Eiland and Richardson, "The Influence of Race, Sex and Age on Judgments of Emotion Portrayed in Photographs," 45 *Communication Monographs*, 167, 174-5 (1976).

[4] Dion, "Physical Attractiveness and Evaluations of Children's Transgressions," 24 *Journal of Personality and Social Psychology*, 207 (1972).

By nature and training, human beings attribute blame even to those who are adversely affected by events over which they have no control, and again physical appearance strongly influences judgment. In an experiement, a young woman was described as having chosen to take a position with a firm that

In another experiment, under rigorously controlled conditions, white college students were shown black and white actors engaging in identical behavior. The only variable differentiating the control group from the experimental group was race. During the course of a conversation, one of the actors, by prearrangement with the experimenter, was seen shoving another actor. Observers were led to believe that this be-

subsequently lost a government contract, causing her to lose her position. Was this the "fault" of the young woman? Those asked to judge were much more likely to agree that she was at fault if a photo of an unattractive female was appended to the story; those receiving a photo of an attractive female were less likely to attribute fault to the subject of the story. The reverse relationship also holds true. "[A]ttractive persons are considered to be more responsible for favorable events than unattractive persons. . . Unattractive people may in some way constitute a group discriminated against." Seligman, Paschall, and Takata, "Attribution of Responsibility for a Chance Event as a Function of Physical Attractiveness of Target Person, Outcome, and Likelihood of Event," Proceedings, 81st Annual Convention, APA, 1973, p. 147-8.

People may also be strongly influenced in their response by the perceived social status of those with whom they interact. People will generally associate more positive characteristics with persons of high social status and negative (or at least less positive) characteristics with those perceived to be of lower social status. Experimental evidence, in one study, for example, indicates that a well-dressed person is more likely to have her/his property returned than a poorly dressed person. Experimenters left dimes in phone booths in Grand Central Station, New York. After these booths were again occupied, the experimenters approached the booths and requested that the 'forgotten' coin be returned. The well-dressed experimenters had their dimes returned much more frequently than those who were poorly dressed. Bickman, "The Effect of Social Status on the Honesty of Others," 85 *Journal of Social Pshychology*, 87 (1971).

haviour was spontaneous and were asked to judge the reason for it. Was the actor who delivered the shove playing around, dramatizing his point, or exhibiting aggressive or violent behavior? Only 17 percent of the white observers who saw a white person shove a black person attributed violent or aggressive intent to the actor, while 75 percent of the observers who saw a black person shove a white person interpreted this behavior as aggressive or violent. According to the researcher: "If this finding is so readily available for college subjects, its generalizability to other subject populations can be expected to be even more dramatic."[5]

Because of this labeling process, it is more likely that negative conclusions will be drawn about the essentially neutral acts of those upon whom negative stereotypes are imposed. It is also more likely that more of these neutral acts will be noticed, because those who are disliked or "different" will especially attract the observer's attention.[6]

[5] Duncan, " Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks," 34 *Journal of Personality and Social Psychology*, 590, 597 (1976).

[6] Miller and Bieri, "Cognitive Complexity as a Function of the Significance of the Stimulus Objects Being Judged," 16 *Psychological Reports*, 1203 (1965). So powerful and pervasive is the stereotyping or labeling process that even protracted and intense professional training may not eradicate its effects. Thus, experiments have shown that highly trained clinicians' diagnoses are biased by pre-judgment labeling of patients according to their alleged status. "Labels may create a judgmental set to focus upon the label itself rather than upon the network of traits and behaviors implied by a particular description of personality." Paquin and Jackson, "Labeling Effects in Clinic Judgments of Psychopathology," 33 *Journal of Clinical Psychology* 109 (1977). See also Routh and King, "Social Class Bias in Clinial Judgment," 38 *Journal of Consulting and Clinical Psychology* 202 (1972).

While stereotyping is common to the general population, the fact that police may employ force and apply sanctions magnifies the importance of their expression of such bias. A team of scholars from the University of Albany School of Criminal Justice recently did an extensive study of police attitudes which affect patrol practices in a joint project with the Oakland, California Police Department. They found that alienation, a feeling of disassociation from and hostility toward a larger group, is especially prevalent among police officers. This alienation, and the stereotyping which inevitably accompanies it, may cause an officer to have "little respect for a large number of citizens (whom he may characterize as intrinsically evil and incorrigible)."[7]

In a study conducted on the process of impression formation which a police officer undergoes while on patrol, both junior and senior officers were found to focus on the demeanor and attitudes of citizens in interpreting citizen behavior. That is, the officers tend to rely more heavily on person-related characteristics

[7] Toch, Grant and Calvin, *Agents of Change: A Study in Police Reform*, 8 (1975).

than on situation-related characteristics.[8] In another study undertaken by the American Bar Association, it was found that

> [I]n the absence of adequate guidance from his supervisors, the tendency of an individual police officer is to attempt to meet the varied demands made upon him through a very personal form of improvisation. Confronted each day by frequently recurring situations, the officer tends to develop his own informal criteria for disposing of matters coming to his attention—depending heavily upon his imagination and resourcefulness. And he employs, as well, the informal criteria which have, over the years, developed within the agency of which he is a part.[9]

Police selection and training processes tend to reinforce stereotypes, according to a recent book by Professor Alan Edward Bent, Associate Director of the Institute of Governmental Studies and Research at Memphis State University and a consultant to the Memphis Police Academy and Memphis Police Department Training Division. According to Professor Bent, the first step is the officer selection process, which tends to seek out applicants who attitudes and opinions are compatible with the existing member-

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[8] Rozelle and Baxter, "Impression Formation and Danger Recognition in Experienced Police Officers", 96 *Journal of Social Psychology*, 53 (1975).

[9] *Standards Relating to the Urban Police Force*, American Bar Association Project on Standards for Criminal Justice, 122-125 (1972).

ship. These personal values are revealed in the oral interview and questionnaire stage, and tend to produce homogeneity within each department. Additionally, the characteristics of applicants seeking police careers tend to perpetuate homogeneity. Police departments have historically been composed mostly of white males with a shared perspective on law and order, as well as other common social mores.[10] Once the recruit passes from training to an assignment in the department itself, police veterans are likely to impart their biased definition of criminality and to train the rookie to pick out suspicious behavior according to often erroneous peer group perceptions. As explained by another student of police socialization:

> While most instructors attempt to be objective, their biases are usually clear, either by virtue of their asides while instructing, their racial jokes, or their obvious contempt toward recent court rulings.[11]

The homogeneity of police attitudes is further demonstrated by an elaborate study of the value patterns of a midwestern police force and a comparison of those attitudes with those held by the public as a whole. The study found "a somewhat larger value gap on the whole between police and blacks than between police

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[10] Bent, *The Politics of Law Enforcement*, 16-17 (1974).

[11] Castberg, "The Exercise of Discretion in the Administration of Justice" (paper prepared for delivery at 1972 Annual Meeting of the American Political Science Association, Washington, D.C., December 5-9, 1972) (quoted in Bent, *op cit.* at 20).

and whites matched on age and education, *but the value gap is considerable in both cases.*" (emphasis added). The authors further noted that the value gap "involves not only discrepancy in *value patterns* but also a discrepancy that implies *value conflict* between police and policed."[12] (emphasis added).

While police street behavior is of extremely low visibility and thus difficult to document, the social researchers who have attempted to examine it have found that, in ambiguous situations, police tend to make decisions based on subjective factors reflecting their personal biases. Yale sociologist Albert J. Reiss, Jr. reports that "lower-class males are disproportionally the targets of police misconduct. . .[13] William Westley, in a study of police in a midwestern city near Chicago, stated that "[f]or the police the Negro epitomizes the slum dweller and, in addition, he is culturally and biologically inherently criminal."[14] Other studies have all reached the same conclusion: that white police officers tend to evidence generally negative feelings toward blacks and, as a result, tend to treat black offenders more harshly.[15]

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[12] Rokeach, Miller and Snyder, "The Value Gap Between Police and Policed," 27 *Journal of Social Issues* 155, 166-7 (1971).

[13] Reiss, *The Public and the Police* 151 (1971).

[14] Quoted in Thomas and Fitch, "Discretionary Decision-Making," 54 *N. Dak. L.Rev.* 61, 73 (1977).

[15] Kephart, *Racial Factors and Urban Law Enforcement* 75-107 (1957) (study of the Philadelphia Police Department); Ferdinand and Luchterhand, "Inner-City Youth, the Police, the Juvenile Court, and Justice," 17 *Soc. Prob.* 510 (1970).

The conclusion reached by all of the relevant literature, in short, is that police officers' behavior will reflect their biases when the officers are given free rein. This conclusion is dramatically reinforced by the results of a 1969 study performed at California State College in Los Angeles. The experiment was conducted by 15 students representing a cross-section of the population. None of the students had received a ticket for a moving violation in the preceding 12 months and all of them had cars in satisfactory condition. Each affixed a "Black Panther" bumper sticker to his/her car and went about his/her normal commuting pattern. With 17 days they have been issued 33 traffic citations and had depleted the $500 fund which had been established to pay traffic fines. Although there were admitted methodological weaknesses in this study, the researcher noted that "it is statistically unlikely that this number of previously 'safe' drivers could amass such a collection of tickets without assuming real bias by police against drivers with Black Panther bumper stickers."[16]

A study done in 1973 at the Center for Police Development of the Southern Methodist University School of Law produced similar results. This study reviewed the incident of stops of both pedestrians and cars that did not result in either a traffic citation or arrest for a specific crime as compared with persons

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[16] Heusenstamm, "Bumper Stickers and the Cops," *Transaction Magazine*, February 1971.

actually arrested for such offenses in that jurisdiction during the preceding year as well as a control sample obtained through the use of a roadblock. It found that the group of people stopped without cause contained a significantly ($p < .01$)[17] greater number of young black men than would be expected based on the control group (the roadblock sample). The author of this study concludes that all police organizations should carefully review street contact with citizens because, "[r]eview of police street performance could lead to a finding that decisions to arrest or stop persons are founded on prejudicial beliefs of the officers which are translated into genuine [but] ill-founded suspicions that such persons are dangerous."[18]

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[17] The possibility of this happening by chance is 1/100.

[18] Bogomolny, "Street Patrol: The Decision to Stop a Citizen," 12 *Crim. Law Bull.* 544, 573 (1976).

APPENDIX B

The Record in the Case of *Lewis* v. *Hyland* Illustrates the Danger of Unregulated Police Discretion in Highway Patrol.

The lengthy record in the case of *Lewis* v. *Hyland*, 554 F.2d 93 (3d Cir. 1977), *cert. denied*, 434 U.S. 931 (1977), offers a glimpse of the far-reaching consequences of the type of police behavior involved in this case and illustrates vividly the findings of social scientists. The *Lewis* case, which was brought in the United States District Court in Newark, New Jersey, charged that the New Jersey State Police were engaged in a pattern or practice of harassing drivers of a particular appearance ("long-haired travelers") by stopping and searching their persons and vehicles without probable cause.[1]

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[1] As set forth by Judge Shaw in the initial opinion in that case:

> It is alleged in the complaint that this is a class action by plaintiffs consisting
>
> . . .of persons of highly individualized personal appearance who travel in private vehicles upon the public toll roads and public highways of the State of New Jersey and who are subject, solely because of said highly individualized personal appearance, to the pattern and practice of selective halting and unreasonable searching of vehicles and travelers.
>
> . . .The said sub-class of persons of highly individualized personal appearance includes, but is not limited to, persons wearing beards, unusual hairstyles, or unorthodox clothing or who in some other way are visually distinguishable from the average user of the said road (said sub-class hereinafter referred to as "longhaired travelers").
>
> Observation of the witnesses who testified and others seated in the courtroom ready to testify as plaintiffs left no

The Third Circuit reviewed the District Court's catalog of 66 separate highway incidents involving state troopers and citizens and observed that the "extensive findings of fact reveal what can only be described as callous indifference by the New Jersey State Police for the rights of citizens using New Jersey roads." 554 F.2d at 94. Of the incidents described, 34 involved "clear violations of Fourth and Fourteenth Amendment rights." *Id.* at 96-7. Most victims of police misconduct are satisfied to continue on their way without further inconvenience, and will not "make waves." The district court realized that plaintiffs' proofs were only the tip of the iceberg, noting that "a relatively small number of those whose rights were violated were represented before the court" *Ibid.*

But perhaps most striking in the *Lewis* record is the fact that of the 66 highway incidents cataloged by the trial judge, 43, or almost two-thirds, were initiated by an arbitrary stop inspired by neither probable cause nor articulable suspicion of a violation of law. A careful reading of Judge Meanor's 66 separately numbered findings in regard to highway incidents reveals that in no more than 23 was there any-

doubt of the "highly individualized" appearance both in the manner of dress, extensive covering of hair over the face with many and varied bizarre forms of trim and lengthy tresses of hair on the head streaming and curling down the back. Whether deliberately or not, the appearances were, to say the least, "eye catching." The reference in the complaint to the "longhaired travellers" was most apt.

Lewis v. *Kugler*, 324 F.Supp. 1220, 1221-2 (D.N.J. 1971)

thing even remotely resembling cause or suspicion as a reason for the stop. (The opinion of Judge Meanor is not officially reported. It appears in the Appendix to the Petition for Certiorari filed with this Court in *Lewis* v. *Hyland*, No. 77-301, October Term 1977, at 39a, 48a. It is hereinafter referred to as Judge Meanor's Opinion.)[2] Twenty-five of those arbitrary, unprovoked stops resulted in illegal searches, according to Judge Meanor.[3]

The incidents cited from the *Lewis* record demonstrate the far-reaching consequences of a rule which permits police to stop any driver at any time without either a systematic method of choosing targets or an articulable reason to single out a particular target.

[2] The descriptions of the following incidents, as numbered by the trial court, indicate they were unprovoked by any action or inaction on the part of the driver: 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 20, 23, 24, 26, 27, 28, 29, 31, 32, 33, 34, 35, 38, 39, 40, 45, 47, 48, 49, 54, 55, 58, 59, 60, 62, 63, 64, 65. (Judge Meanor's Opinion, at 52a-120a). A number of the incidents initiated by a "routine" stop for documentary inspection did not result, according to Judge Meanor, in illegal searches either because no search at all took place or because the search was held to be legal, generally on grounds of acquiescence by the driver. On the other hand, some of the 34 illegal searches found by Judge Meanor resulted from perfectly proper stops for traffic or other law violations. The legality or illegality of any ensuing search is, of course, of limited relevance to the instant case, which involves the threshold question of whether arbitrary highway stops by roving police patrols without cause or articulable suspicion are constitutional.

[3] Incidents Number 1, 2, 3, 5, 6, 7, 8, 10, 14, 15, 18, 20, 23, 24, 26, 27, 28, 31, 32, 33, 38, 40, 47, 49, 55. (Judge Meanor's Opinion, at 52a-120a).

These figures are further illuminated by Judge Meanor's finding that in the year 1970, on the New Jersey Turnpike and Garden State Parkway alone, New Jersey State Police were involved in "approximately 545,000" highway incidents in which "summonses or warnings were issued, vehicles other than trucks were inspected, or possible drunk drivers were checked," and that in only about one-half of those incidents (275,000) was a summons actually issued. (Judge Meanor's Opinion at 48a). The opportunity for abuse in police-driver contacts in the absence of strict systematic controls, if not obvious as a matter of common sense or sufficiently documented by general social science research, is *strikingly* illustrated by the *Lewis* record.[4]

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[4] Judge Meanor denied plaintiffs the injunctive relief they sought because "there was no deliberate pattern and practice of violating Fourth and Fourteenth Amendment rights on the part of the Attorney General, the Superintendent of the New Jersey Police as a whole." Judge Meanor's Opinion at 48a. The Third Circuit affirmed, 554 F.2d 93, based on this Court's Opinion in *Rizzo* v. *Goode*, 423 U.S. 362 (1976).